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NO. 85-1383

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Kaonohi Ohana, Ltd. (hereinafter "Kaonohi") entered into a contract with Respondent, Nancy E. Sutherland, in which Kaonohi agreed to sell 5.36 acres of vacant fee simple beach front property on the Hawaiian Island of Kauai, to Sutherland.[1] Sutherland's offer was "contingent upon seller obtaining such approval as is required by its Articles of Incorporation and By-Laws and the statutes of the State of Hawaii to convey title to the subject property."

Kaonohi was an Hawaii Corporation formed pursuant to a plan of reorganization in the Bankruptcy Court for the Northern District of California. The sole asset of Kaonohi was the Kauai land which was to be sold either before or after development to pay unsecured creditors of the bankrupt, Dr. Alex Ferreira. Under the plan, the creditors and

[1]Respondents, Donald Sutherland and Stephen Newnham, Trustees of the Ralph L. Evans Trust, were intended assignees of the contract from Sutherland.

Ferreira were to be stockholders of Kaonohi. After the property was sold, Kaonohi was to be liquidated and distribution made to the stockholders under a formula depending on the class of stock held.

All negotiations and the final acceptance of the Sutherland offer "on behalf of the board of directors" of Kaonohi was handled by lawyer Boyce Brown. Brown was a creditor of Ferreira, and an officer, director, and sole stockholder of record of Kaonohi. He held the stock as trustee for the unsecured creditors and Ferreira. Brown and his law firm formed the corporation in Hawaii.

The basic issue in this case was the applicability of Hawaii corporate law, Section 416-33 Hawaii Revised Statutes[2] to

[2]Section 416-33 provides in part: "A voluntary sale ... of all or substantially all of the property and assets of any domestic corporation ... may be authorized by it ... when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power.

the transaction. A subsidiary issue not reached by the Court of Appeals was whether Brown, the sole stockholder of record as trustee for numerous un-named individuals, by accepting the offer "on behalf of the board of directors" could thereafter invalidate the contract because the stockholder approval required by Section 416-33 had not been obtained. After entering into the contract with Sutherland, Kaonohi received a better offer from actor Sylvestor Stallone. Kaonohi accepted the Stallone offer and repudiated its contract with Sutherland.

Respondents thereupon filed suit in the United States District Court for the District of Hawaii for specific performance (Civil No. 84-0692). On the same day Kaonohi filed suit against Sutherland in the Circuit Court of the Fifth Circuit, State of Hawaii on the island of Kauai asking for a declaratory judgment that Section 416-33 voided the contract. Sutherland removed the

declaratory judgment action from the state court to the United States District Court (Civil No. 84-0748) and the two cases were consolidated for an expedited hearing on cross motions for summary judgment and Kaonohi's motion to dismiss.

The District Court granted summary judgment in favor of Kaonohi on the declaratory judgment action and dismissed the suit for specific performance, holding as a matter of law that Section 416-33 applied to the transaction, that any "normal course of business exception" to Section 416-33 did not apply and that the necessary stockholder approval of the transaction had not been obtained.

The United States Court of Appeals for the Ninth Circuit reversed holding that the "ordinary course of business exception" applied to Section 416-33 and the statute did not apply to the transaction in this case. Therefore, no stockholder approval was

required to validate the contract of sale entered into between Kaonohi and Sutherland.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD NOT CONSIDER THE QUESTION OF WHETHER SPECIAL WEIGHT IS TO BE GIVEN A DISTRICT COURT'S DECISION ON STATE LAW WHERE PETITIONER AT NO TIME REQUESTED THE COURT OF APPEALS TO GIVE SPECIAL WEIGHT TO THE DISTRICT COURT'S RULING.

The legal issue before the District Court and the Court of Appeals was the existence and application of the "ordinary course of business" exception to Section 416-33 which requires the approval of the holders of three-fourths of the stock to sell all the assets of a corporation. This issue has never been decided by any court in Hawaii in a reported decision. The District Court assuming that such an exception existed found it not applicable:

> "Assuming that Hawaii courts would follow the `normal course of business' exception, it is the determination of this Court that the sale of the property in this case does not fall within that exception and therefore is subject to

> the shareholder approval requirement of the statute." Petitioner's Appendix (hereinafter "App.") p. A6.

The Court of Appeals in its per curiam decision reversed:

> "The exception that has been created to what would facially appear to be the absolute rule of the shareholder consent statutes constitutes a rational and consistent effort to implement the statutory provisions in light of their purpose and history, and clearly represents the prevailing rule in American jurisprudence. Thus, we believe that the courts of Hawaii would adopt the exception discussed above. Accordingly, since appellee corporation was formed for the purpose of selling its only asset, a parcel of real estate, consent of its shareholders under Section 416-33 was not required;". 776 F.2d 1427, App. pp. A19-A20.

Petitioner alleges as error the Court of Appeals' view that "The district court's interpretation of Hawaii law is . . . reviewed de novo." 776 F.2d 1426, App. p. A13. Petitioner now argues that the Court of Appeals did not give enough weight to the District Court's decision on a state law issue of first impression. Although Petitioner complains that the Court of

Appeals' review of the district court's decision was de novo, Petitioner in its opening brief argued for this very standard:

> "To the extent that this Court is called upon only to review the motions for summary judgment, the standard of review is a de novo review. That standard normally applies to a review of appeals from orders granting or denying of motions for summary judgment. International Ladies Garment Workers Union AFLCIO v. Surech, 681 F.2d, 624 (9th Cir., 1981). In a de novo review, the appellate court looks at the findings and conclusions reached by the lower court and makes it's own independent determination as to whether the court erred in (1) finding no material facts were in dispute and/or (2) holding the movant was entitled to a judgment as a matter of law." Appellee's Answering Brief, p. 11.

The Court of Appeals adopted the "ordinary course of business" exception to Section 416-33 citing the California case of Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 206 P.2d 847 (1949) and cases from other jurisdictions. 776 F.2d 1427, App. pp. A17-A18. In citing the Jeppi case, the Court noted:

> "The parties agreed at oral argument that the courts of Hawaii frequently look to decisions from California when deciding cases of first impression." 776 F.2d 1427, n. 4, App. p. A17.

The agreement by Petitioner that the courts of Hawaii frequently look to California decisions as persuasive authority when deciding cases of first impression at the very least advised the Court of Appeals that it could rely on the reasoning of Jeppi v. Brockman Holding Co. as authority for adopting the "ordinary course of business" exception to Section 416-33.

To grant the Petition for Certiorari under these circumstances would violate the rule that courts will not be reversed when they are led into error. Petitioner, after advising the Court of Appeals to review the granting of summary judgment de novo and agreeing that the Hawaii courts often look to California decisions in cases of first impression, now claims that the Court of Appeals committed error by reviewing the state law issue de novo and holding that the

Hawaii courts would follow the California rule which is also the "prevailing rule in American Jurisprudence". 776 F.2d 1427, App. pp. A17-A18.

Petitioner never even called this alleged error to the Court's attention by way of a petition for re-hearing. Therefore, the Petition for Certiorari should be denied. As this Court pointed out in Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970):

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Husty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927)."

It should also be noted that the District Court assumed that a "normal business exception" would be adopted by the courts of Hawaii. The court merely refused to apply the exception in the case of a corporation formed as a result of a bankruptcy reorganization to take title to and sell unimproved property the proceeds of

which were to be paid to unsecured creditors and the bankrupt. The District Court reasoned:

> None of the cases cited by Sutherland in support of her argument that section 416-33 is inapplicable involved the type of situation presented here. Kaonohi Ohana was formed for the purpose of selling the property in order to pay off Ferreira's creditors and, apparently, Ferreira himself. Clearly all the claimants have an important stake in the sale of the property, the corporation's only asset, since the satisfaction of their claims depends on the terms of the sale. Accordingly, it would seem imperative that their consent be obtained. App. pp. A6-A7.

The cases cited by Sutherland that the District Court found inapplicable were the same cases the Court of Appeals relied on to adopt and apply the "ordinary course of business" exception to section 416-33. These cases were not Hawaii cases because none exist. The applicability of the rule of law expounded in these cases to the undisputed facts of the case at bar was not an issue that needed special expertise in Hawaiian Law

to decide. Certainly the judges of the Court of Appeals are as well qualified as the District Court in analyzing decisions from other states and applying the reasoning of those cases to the undisputed facts of this case.

The District Court apparently found those cases not applicable because of the plan of reorganization in bankrutcy from the Northern District of California. The legal effect of a plan of reorganization from a bankruptcy court in California is not an issue that a judge in Hawaii is better qualified to decide than the Court of Appeals.

Even if this court believes that the question of the weight to be given a state law decision by a district judge is an issue this court should consider, this is not an appropriate case in which to decide the matter. The District Court's decision was not based on Hawaii law but the applicability of out of state decisions to a sale by a

corporation organized pursuant to a bankruptcy reorganization. The Court of Appeals properly decided the question de novo.

II. PETITIONER MADE NO REQUEST TO THE COURT OF APPEALS TO CERTIFY THE ISSUE OF STATE LAW TO THE SUPREME COURT OF HAWAII, AND PETITIONER SHOULD NOT NOW MAKE SUCH A REQUEST AFTER LOSING IN THE COURT OF APPEALS.

After losing the case on appeal in the Court of Appeals, Petitioner for the first time claims that the interpretation of Section 416-33 and its applicability to the facts herein should have been certified to the Supreme Court of Hawaii. Again, the failure to make such a request before the court had ruled against Petitioner is a fatal defect in the Petition. The Court should not consider the certification issue because it was not raised in the Court of Appeals.

In any event, this Court has stated:

> "Where the certification process is available, resort to it is not obligatory." Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974).

As pointed out in the concurring opinion in Lehman Brothers, certification may be expensive and will delay the eventual decision of the case. 416 U.S. 394-395. In any event, this is not an appropriate case for certification.

There is little chance that future litigants will require a definitive opinion as to the existence and application of the "ordinary course of business" exception to Section 416-33. In the close to half century since Section 416-33 was adopted, the matter has not been decided by the Supreme Court of Hawaii and the section will be superceded by the Model Business Act which explicitly adopts the "ordinary course of business" exception. 1983 Hawaii Session Laws, Act. 167, sec. 78.[3]

[3]Sale of assets in regular course of business and mortgagor pledge of assets. The sale, lease, exchange, or other disposition of all, or substantially all, the property and assets of a corporation in the usual and regular course of its business and the mortgage or pledge of any or all property and assets of a corporation whether or not in the usual

III. THERE IS NO NEED FOR FURTHER CONSIDERATION OF THE LEGAL ISSUE HEREIN.

Petitioner's final argument is that the Court of Appeals was wrong in its interpretation of state law. It argues "Section 416-33 HRS is plain and unambiguous and the district court properly interpreted it according to its plain, specific terms." Br. 40. Petitioner maintains that the Hawaii courts would not adopt the "ordinary course of business" exception to Section 416-33, but that is contrary to the assumption of the District Court and the holding of the Court of Appeals.

This Court need not decide questions of state law already considered by the District

footnote cont'd./ and regular course of business may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, including shares, obligations, or other securities of any other corporation, domestic or foreign, as shall be authorized by its board of directors; and in any such case no authorization or consent of the shareholders shall be required.

Court and the Court of Appeals. Butner v. United States, 440 U.S. 48, (1979); Runyon v. McCrary, 427 U.S. 160, 181-182 (1976); In Re McLinn, 739 F.2d 1395, 1398-99 (9th Cir. 1984).

The fact that the Hawaii Legislature adopted the "ordinary course of business" exception in the Model Business Act, 1983 Session Laws, Act 167, sec. 78, cannot be considered evidence that the prevailing American rule of jurisprudence implying an "ordinary course of business" exception to Section 416-33 would not be adopted by the courts of Hawaii if the matter came before them. As the Court of Appeals explains:

> "The statutes, including Hawaii's, were enacted for the purpose of abrogating the common-law rule which required unanimous consent of the shareholders. However, the common law rule itself had an exception for sales in the ordinary course of the corporation's business, and the courts have continued to apply that exception to the statutory provisions on the theory that the statutes were intended to abrogate only the uanimity rule, not the exception." 776 F.2d 1427, App. p. A16.

Petitioner contends "In Hawaii, statutes in derogation of the common law are strictly construed." Br. 56. The common law rule is that the "ordinary course of business" exception applies. Adopting the "ordinary course of business" exception to Section 416-33 complies with the rule of statutory construction in conformity with the common law argued for by Petitioner.

The Court of Appeals applied the "ordinary course of business" exception to Section 416-33 to the undisputed facts of this case. The District Court assumed that such an exception would apply in an appropriate case. There is no need for further review as to whether such an exception exists under Hawaii law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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